No. 196

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1916.

UNITED STATES OF AMERICA, *Appellant*,

vs.

T. H. DUNN, S. E. DUNN, *ET AL.*, *Appellees*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Supplemental Brief for the Dunns, Appellees.

GEO. S. RAMSEY,
WILLIAM B. JOHNSON,
HUGH W. McGEE,
EDGAR A. SMEDLEY,
VILLARD MARTIN,
Counsel for T. H. and S. E. Dunn.

IN THE SUPREME COURT OF THE UNITED STATES.

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SUPPLEMENTAL BRIEF FOR THE DUNNS, APPELLEES.

May It Please the Court:

Supplemental to pages 25 to 30 of our original brief we offer the following:

A.

The Eaves Curatorship Survived Statehood.

This point is firmly settled by a long line of Oklahoma decisions. To overrule them would destroy many titles and work great injury to many innocent parties.

—*Eaves* v. *Mullen*, 25 Okl. 679;
Burdett v. *Burdett*, 26 Okl. 416;
MaHarry v. *Eatman*, 29 Okl. 46;
Scott v. *McGirth*, 41 Okl. 520;
Crosbie v. *Brewer*, 68 Okl. 16.

This is true by virtue of section 1 of the schedule to the Oklahoma Constitution. It is agreed, over the signature of counsel (see Rec., pp. 234-240) that upon the admission of Oklahoma as a state all guardianships, curatorships, etc., pending in the United States Court for the Southern District of the Indian Territory at Marietta passed into the County Court of Love County, Oklahoma.

B.

As stated under point 2, page 25, of appellee's original brief, "Two separate and distinct guardianships or curatorships cannot exist at the same time in the same state for one and the same person."

A guardianship of the estate of a minor is, in a sense, a proceeding *in rem*.

Section 3330, Oklahoma R. L. 1910, expressly declares that, "In all cases the court making the appointment of a guardian has exclusive jurisdiction to control him in the management and disposition of the person and property of his ward."

Section 6544, Oklahoma R. L. 1910, declares that, "Every guardian must manage the estate of his ward frugally and without waste," etc., and "may sell the real estate, upon obtaining an order of the County Court therefor," etc.

Section 6569, Oklahoma R. L. 1910, declares that "the County Court may make such other orders and give such directions as are needful for the management, investment and disposition of the estate and effects, as circumstances require."

Under the authority of the above sections of the statute the County Court of Love County had jurisdiction to approve the lease executed by Eaves.

—*Duff* v. *Keaton*, 33 Okl. 92;

Papoose Oil Company v. *Swindler*, 95 Okl. 264, 221 Pac. 506;

Cabin Valley Mining Co. v. *Hall*, 53 Okl. 760;

Jackson v. *Gates Oil Company*, 297 Fed. 549 (8th Cir. Apps.);

Clayton v. *Tibbens*, 298 Fed. 18 (8th Cir. Apps.).

As the Love County Court acquired jurisdiction over the estate of Allie Daney, as successor to the United States Court for the Southern District of the Indian Territory, it thereby, under the express provisions of section 3330, Oklahoma R. L. 1910, had "exclusive jurisdiction to control him in the management and disposition of * * * the property of his ward."

In *Dewalt* v. *Cline*, 35 Okl. 199, the court said:

"The County Court in acquiring jurisdiction of the estate or *rem* had jurisdiction coextensive with the state in the settlement of the estate of the decedent and the sale and distribution of his real estate, *and excluded the jurisdiction of the County Court of every other county.* Sections 5144 and 5510, Comp. Laws 1909; sections 1178 and 1542, St. Okl. 1893; section 2 of the Schedule to the Constitution.

"Section 23 of the Schedule (to the Okla. Constitution), *supra*, contemplated that such pending probate proceedings should continue to final determination just as if there had been no change in the form of government. *Eaves* v. *Mullen*, 25 Okl. 679, 107 Pac. 433; *Davis* v. *Caruthers*, 22 Okl. 323, 97 Pac. 581." (Italics ours.)

In *Crosbie* v. *Brewer*, 68 Okl. 22, the court, in an opinion involving conflicting guardianships, one of which originated before statehood, said:

> "When one court has acquired jurisdiction, no other court of concurrent jurisdiction will interfere or attempt to assume jurisdiction of the same matter. *Mail* v. *Maxwell, et al.*, 107 Ill. 554. It is fundamental that the court which first acquires jurisdiction of the parties and subject-matter will retain it until divested of it by some court of appellate powers or the cause is regularly transferred in some way provide by statute. Any other procedure would lead to inextricable confusion and conflict."

See, also, the following guardianship cases:

> *Soules* v. *Robinson*, 158 Ind. 97, 92 Am. St. Rep. 301;
>
> *Gilbert* v. *Stephens*, 106 Ga. 753, 32 S. E. 849;
>
> *Estridge* v. *Estridge*, (Ky.) 76 S. W. 1101.

Under these decisions the second guardianship is void. When the Love County Court, as the successor to the United States Court, obtained jurisdiction over the guardianship of the estate of Allie Daney her property was withdrawn from the jurisdiction of every other County Court in the state. A guardianship like a receivership cannot be managed and operated under the direction and supervision of two different courts, although they may have original concurrent jurisdiction over that class of cases. The rule is summed up by this court in *Wabash Railroad* v. *Adelbert College*, 208 U. S. 54, as follows:

> "When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is there-

by withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary *to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property.* * * * Those principles are of general application *and not peculiar to the relations of the courts of the United States to the courts of the states.*" (Italics ours.)

See, also:

Palmer v. *Texas*, 212 U. S. 125;

Farmers' Loan & Trust Co. v. *Lake Street Elevated R. Co.*, 177 U. S. 51-61.

The Love County Court's jurisdiction over the estate was coextensive with the State of Oklahoma without regard to where the land or property was situated.

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The LeFlore County Court had no jurisdiction even to appoint Thomas guardian of the person inasmuch as the guardianship over her estate was in Love County and the proper way to get the guardianship into LeFlore County was by removal, as provided for by sections 6196, 6197 and 6198, Okla. R. Laws 1910.

The Oklahoma Legislature passed an Act effective February 26, 1910, providing for the transfer of guardianships from the County Court inheriting the same from the United States Court in the Indian Territory, to

the County Court of the minor's domicile—to take care of cases exactly like this. The Act of 1910, is embodied in sections 6196 to 6198, inclusive, Oklahoma R. L. 1910, section 6196 being as follows:

> "When it is made to appear that any probate matter pending in any court of this state, which, by Acts of Congress and the constitution, *was transferred from the courts of the Territory of Oklahoma and the United States Courts, in the Indian Territory to the courts of this state, is not in the county where the venue of such suit, matter or proceeding would lie if arising after the admission of this state into the Union,* the court where such suit, matter or proceeding is pending shall, upon the application of the guardian, * * * make an order transferring such suit, matter or proceeding to the county where the *venue would properly lie if such suit, matter or proceeding had arisen since the admission of this state into the Union,* by transmitting to such county the original papers, together with certified copies of all orders and judgments, upon the payment of all accrued costs."

In *Leonard* v. *Childers,* 67 Okl. 226, the court, discussing conflicting guardianships, said:

> "There was no provision for concurrent jurisdiction of County Courts in administering the estates of minors, nor any provision for a guardianship of the person in one county and of the estate in another county, but the court having jurisdiction to appoint a guardian of the person was the court having jurisdiction to appoint a guardian of the estate."

It is clear that the only way the LeFlore County Court could acquire jurisdiction was by a transfer of the existing guardianship from Love County to the County Court of LeFlore County, and that not having been done, the Thomas guardianship was absolutely void.

Respectfully submitted,

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MAY IT PLEASE THE COURT:

Since the filing of appellant's brief and appellees' reply, an Oklahoma Supreme Court Commissioner, on January 7, 1925, handed down the opinion in *Burton vs. Collie,* set forth at large in an appendix to the appellant's reply brief. That

opinion attempts to commit the Court to the unprecedented holding that two separate courts may exercise concurrent jurisdiction over the same estate of an infant through two separate guardianships. That case is now pending on rehearing before the Supreme Court, and when it will be decided no one can very well guess, as the Oklahoma Supreme Court of January 30, 1925, had under consideration 236 petitions to rehear, some of which have been pending for nearly a year. (See Jan. 30, 1925; Okla. App. Court Rep.)

The Government never before contended that the Eaves and Thomas guardianships were both valid, but pitched its battle against the Eaves guardianship, as shown by the allegations in the bill (Rec., p. 8).

The present opinion in *Burton vs. Collie* not only violates that common-sense principle so universally accepted by this Court and the State courts, to wit, that "when a court of competent jurisdiction has, by appropriate proceedings, taken property in its possession through its officers, the property is thereby *withdrawn from the jurisdiction of all other courts,*" *but* ignores six prior Oklahoma Supreme Court decisions expressly holding the first guardianship excludes the jurisdiction of *all* other courts to appoint a guardian for the same infant. The very learned Commissioner writing the opinion in *Burton vs. Collie* failed to comprehend the difference between jurisdiction *in personam* and *in rem*. He confounds concurrent jurisdiction in personal actions with proceeding *in rem*. True it is that in personal actions it is *not* the judgment in the action *first* begun, but the *first final* judgment, though it may be in the last action brought, that renders the issues *res judicata* in both actions.

The learned Commissioner's suggestion that although both

the Love County Court and Le Flore County Court have actual concurrent jurisdiction, an action begun in one of said Courts (say in the Le Flore County Court) to sell land may be abated on the application of the guardian in the other county (say Love County), further shows he failed to comprehend the basic reason for the rule that two Courts can not and will not attempt to exercise jurisdiction over the same estate or property at the same time. Suppose one Court refused to abate, then what? And then suppose the two Courts order their respective guardians to contract with separate lessees on the same day, which lease is good? And is it necessary that each Court and guardian have an agent stationed in the court room of the other Court to watch every day's proceedings so a motion to abate can be filed before any order is made? The Commission's opinion, if it stands, will have the very great merit of making two or more guardianships grow where only one grew before, and with every new guardianship there will bud and ripen attorney fees for the new guardian's lawyers. When the first legal guardian refuses to deal with the estate of his ward to suit the interest of some land or mineral-lease grafter, a small sum will induce the infant to move to another county, where a friendly guardian may be appointed. It is inconceivable that the Oklahoma Supreme Court will let that opinion stand. This Court is not bound by the decision in *Burton vs. Collie* because it does not follow the settled rule in Oklahoma to the contrary.

In *Burgess vs. Seligman*, 107 U. S., 20-35, this Court said:

> "When the transaction took place, and the decision of the Circuit Court was rendered, not only was there no settled construction of the statute on the point

> under consideration, but the Missouri cases referred to arose upon *the identical* transactions which the Circuit Court was called upon to consider. It can hardly be contended the Federal Court was to wait for the State Court to decide the merits of the controversy and then simply *register* their decision; or that the judgment of the Circuit Court should be reversed merely because the State Court has adopted a different view." See also *Kuhn vs. Fairmont Coal Co.*, 215 U. S., 349.

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This point is firmly settled by a long line of Oklahoma decisions. To overrule them would destroy many titles and work great injury to many innocent parties.

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This is true by virtue of sections 1 and 23 of the schedule to the Oklahoma Constitution, and section 19 of Oklahoma Enabling Act (34 St. L., p. 267). It is agreed, over the signature of counsel (see Rec., pp. 234-240), that upon the admission of Oklahoma as a State all guardianships, curatorships, etc., pending in the United States Court for the Southern District of the Indian Territory, at Marietta, passed into the County Court of Love County, Oklahoma.

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A guardianship of the *estate* of a minor is a proceeding *in rem*—as much so as a receivership or administration of a decedent's estate.

Section 3330, Oklahoma R. L., 1910, expressly declares that "In all cases the court making the appointment of a guardian has exclusive jurisdiction to control him in the management and disposition of the person and property of his ward."

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The Act of 1910 is embodied in sections 6196 to 6198, inclusive, Oklahoma R. L., 1910, Section 6196 being as follows:

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In *Parmenter vs. Rowe,* — Okla., —; 200 Pac., 683, the Oklahoma Supreme Court in 1921 sustained its writ of prohibition, directed to the County Court of Okfuskee County,

restraining that Court from appointing a guardian for Martha Jackson, a resident of that county, it being made to appear that a guardian had been appointed prior thereto by the County Court of Seminole County. In the opinion the Chief Justice said:

> "When the County Court of Seminole County took jurisdiction, the same was coextensive with the State, and *excluded the jurisdiction of every other county.*"

In *Baird vs. England*, — Okla., —; 205 Pac., 1098, decided in 1922, the Court was considering the jurisdiction of a County Court over the administration of an estate. An administrator was appointed by the United States Court for the Northern District of the Indian Territory, and upon statehood the County Court of Cherokee County, Oklahoma, took jurisdiction as the successor to the United States Court in the Territory. The Supreme Court held that no other County Court in the State could acquire jurisdiction and said:

> "The County Court that first acquires jurisdiction to administer on the estate of a deceased person has jurisdiction to the exclusion of the County Court of every other county."

State ex rel., etc., vs. Hazelwood, 196 Pac., 937, is another writ of prohibition case in which the Oklahoma Supreme Court granted a writ to restrain the McIntosh County Court from appointing an administrator, it appearing the County Court of another county had made a prior appointment.

The Commissioner, in his opinion in *Burton vs. Collie*, does not pretend to overrule these prior opinions, but actually

cites some of them to support his conclusion. A citation to Taltarum's case would have been more in point.

Section 19 of Oklahoma Enabling Act (*34 St. L., p. 267*) provides "That the courts of original jurisdiction of such State shall be deemed to be the successor of all courts of original jurisdiction of said Territories and as such take and retain custody of all records," etc.

This Act of the Legislature was passed under the authority of Section 23 of Article 25 of the Oklahoma Constitution, which is as follows:

> "When this Constitution shall go into effect, the books, records, papers and proceedings of the Probate Court in each county, and all causes and matters of administration and guardianship, and *other matters pending therein*, shall be transferred to the County Court of such county, except of Day County, which shall be transferred to the County Court of Ellis County, and the County Courts of the respective counties shall proceed to final decree or judgment, order, or *other termination* in the said several *matters* and *causes* as the said Probate Court might have done if this Constitution had not been adopted. The District Court of any county, the successor of the United States Court for the Indian Territory, in each of the counties formed in whole or in part in the Indian Territory, shall transfer to the County Court of such county, all matters, proceedings, records, books, papers, and documents appertaining to all causes or proceedings relating to estates: ***Provided, That the Legislature may provide for the transfer of any of said matters and causes to another county than herein prescribed.***"

It is clear that the only way the Le Flore County Court could acquire jurisdiction was by a transfer of the existing guardianship from Love County to the County Court of Le Flore County, and that not having been done, the Thomas guardianship was absolutely void.

Respectfully submitted,

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WILLIAM G. DAVISSON,
Counsel for the Gillams.

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BRIEF FOR J. ROBERT GILLAM AND WIFE, APPELLEES.

May It Please the Court:

On behalf of J. Robert Gillam and wife we adopt the brief and argument filed on behalf of Dunn and wife, and in addition thereto call the court's special attention to the following:

The Government brought this suit in *equity* for the cancellation of the oil and gas lease and for an accounting for the oil taken out of the land (see 3rd

and 4th paragraphs of the prayer to the bill, Rec., pp. 14-15). As pointed out in the brief for the Dunns, the Government, if the allegations of the bill are true, had the right to elect to bring a suit in equity for cancellation and accounting, or a suit at law for damages. The Government elected to sue in equity for rescission, cancellation and accounting. After the District Court dismissed the Government's bill on the merits and the case was pending in the Court of Appeals, the Government and the Bull Head Oil Company entered into a compromise agreement wherein the Government agreed to abandon all claims against the Bull Head and certain of its stockholders, to-wit, Jake L. Hamon, J. S. Mullen, Errett Dunlap, and other stockholder defendants, "save and except T. H. Dunn, N. E. Dunn, J. Robert Gillam, and Mrs. J. Robert Gillam," and agreed that it, the Government, "will not insist upon any judgment impressing a trust upon any of the stock in Bull Head Oil Company heretofore owned by J. Robert Gillam or Mrs. J. Robert Gillam and assigned to Jake L. Hamon, but will insist upon a money judgment against them for whatever amount the testimony may show should be awarded" (see Rec., pp. 256-257). Neither Dunn and wife nor Gillam and wife were parties to this compromise agreement. Gillam and wife were not the owners of any stock in the Bull Head Oil Company at the time this compromise agreement was entered into. The Government's bill alleges that the lease was obtained

from Thomas, guardian, by fraud, and if that is true, the Government, as suggested, had the right to elect whether it would repudiate the lease and maintain a suit in equity for rescission or affirm the lease and maintain a suit *at law* for damages. Having elected to rescind and filed its suit in equity the Government cannot amend its bill in the Court of Appeals under a stipulation with a part of the defendants and without the knowledge and consent of the Gillams, and thereby convert the suit into an action at law for damages.

We make two points:

(1) That having elected to disaffirm the lease and sue in equity for rescission and cancellation, the Government could not, by way of amendment in the trial court, reverse its election, abandon the suit in equity for rescission, affirm the lease and convert its suit into an action at law for damages.

(2) Assuming that the trial court would have been justified in allowing the Government to convert the action, by amendment, into a suit at law for damages, certainly the action can not be changed after the case reaches the Court of Appeals so as to convert this suit into an action for damages.

The compromise agreement wherein the Government agreed to waive its alleged right to impress a trust upon the stock formerly owned by the Gillams and sold by them to Jake L. Hamon and in lieu thereof "insist upon a money judgment against

them for whatever amount the testimony may show should be awarded," was made and entered into without the knowledge or consent of the Gillams and without any notice to them. Obviously the Government, by consent of a part of the defendants and without notice to the other defendants, or without their consent, can not convert this action into a suit at law. If the Government had elected to affirm the lease and sue for damages it would have had an adequate remedy at law and equity would have no jurisdiction. Obvisouly the Government can not change the suit after it has been appealed, and this is true without regard to whether or not the trial court could have properly permitted an amendment converting the action into a suit at law. In a law action defendants would have a right to a trial by jury.

In *Shields* v. *Barrow,* 17 How. 130-146, 15 L. ed. 158, this court said:

> "A bill may be originally framed with a double aspect, or may be so amended as to be of that character, but the alternative case stated must be the foundation for precisely the same relief."

That means, however, that the suit must remain an action in equity.

In *Hardin* v. *Boyd,* 113 U. S. 756-768, 28 L. ed. 1141, this court said:

> "It may be said, generally, that in passing upon applications to amend the ends of justice should never be sacrificed to mere form, or by too rigid an adherence to technical rules of practice. * * * And an amendment should rarely, if ever, be permitted where it would materially change the very substance of the case made by the bill, and to which the parties have directed their proof."

In *Smith* v. *Woolfolk*, 115 U. S. 143-150, 29 L. ed. 359, this court, quoting from *Shields* v. *Barrow*, *supra*, said:

> "To insert a wholly different case is not properly an amendment and should not be considered within the rules on that subject."

We therefore respectfully submit that the judgment of the Court of Appeals should be affirmed.

William G. Davisson,
Counsel for the Gillams.